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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LYNWOOD INVESTMENTS CY LIMITED,

Plaintiff,

VS.

MAXIM KONOVALOV, IGOR SYSOEV,
ANDREY ALEXEEV, MAXIM DOUNIN, GLEB
SMIRNOFF, ANGUS ROBERTSON, NGINX,
INC. (BVI), NGINX SOFTWARE, INC., NGINX,
INC. (DE), BV NGINX, LLC, RUNA CAPITAL,
INC., EVENTURE CAPITAL PARTNERS II LLC
and F5 NETWORKS, INC..

Defendants.

Case No. 3:20-CV-03778-MMC

**PLAINTIFF'S SUPPLEMENTAL
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
THE F5 DEFENDANTS' MOTIONS
FOR ATTORNEYS' FEES**

Hon: Maxine M. Chesney
Hearing Date: February 21, 2023
Time: 9:00 AM
Courtroom: Courtroom 7, 19th Floor

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1 Pursuant to the Court’s December 20, 2022 Order (ECF 184),¹ Plaintiff Hemma Investments
 2 CY Limited f/k/a Lynwood Investments CY Limited (“Lynwood”) respectfully submits this
 3 supplemental opposition to the F5’s Motion for Attorneys’ Fees (ECF 173, ECF 187).

4 **INTRODUCTION**

5 F5 filed a motion for attorneys’ fees, seeking \$837,602.15 under Section 505 of the Copyright
 6 Action. In response, Lynwood argued that the Court should deny the motion, but in the alternative
 7 that if the Court was to award fees the award must be limited to fees incurred defending against the
 8 lone Copyright claim the Court adjudicated. ECF 178, pp. 20-22. Lynwood also argued that F5’s
 9 motion failed to include the legal invoices from its lawyers, which was “especially problematic”
 10 because “Defendants improperly seek fees for unrelated, non-copyright claims.” ECF 178, p. 23;
 11 *see also Ent. Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1231 (9th Cir.
 12 1997)² (holding “the district court erred in not requiring [the defendant] to submit its original time
 13 records and billing statements so that [the plaintiff] – and the district court – could determine whether
 14 the fees being claimed were truly for time spent in defending against the [copyright] claims”).

15 The Court ruled that F5 is entitled to fees under Section 505 of the Copyright Act, but held
 16 that the Court and Lynwood could not properly analyze the scope of the fees recoverable because of
 17 F5’s failure to submit time records from its lawyers. ECF 183, p. 14-15. The Court did not reach
 18 the issue of whether F5 could recover fees for work on claims other than the adjudicated copyright
 19 claim.³ The time records now produced by F5 reveal that the overwhelming majority of F5’s
 20 attorneys’ fees were not incurred for the Copyright Act claim or any claim related thereto. Therefore,

21 ¹ Defendants F5 Networks, Inc., NGINX, Inc. (BVI) and NGINX Software, Inc. (collectively, “F5”)
 22 contend that they submitted their supplementation pursuant to Local Rule 7-11. However, Local
 23 Rule 7-11 applies only to “miscellaneous administrative matters, not otherwise governed by a federal
 24 statute, Federal Rule, local rule, or standing order of the assigned Judge.” F5’s motion is pursuant
 25 to the Copyright Act, and the Court explicitly ordered F5 to supplement its submission and Plaintiff
 26 to respond to the supplement. ECF 183, p. 15. Therefore, Local Rule 7-11 does not apply.

27 ² Unless otherwise noted, case law citations in this supplemental opposition omit internal
 28 quotations and citations.

29 ³ In its reply in further support of its motion for fees, F5 argued that Lynwood’s opposition brief did
 30 not dispute F5’s entitlement to fees incurred for “general” case work. ECF 180, p. 12. That is wrong.
 31 Lynwood argued at length that F5 was only entitled to fees defending against the copyright claim.
 32 ECF 178, pp. 20-22. Moreover, as a result of F5’s deficient submission that lacked detailed time
 33 records, it was impossible for Lynwood to discern what specifically related to the Copyright claim.

1 the Court should limit the award to the reasonable fees actually incurred defending against the lone
 2 adjudicated copyright claim.

3 **ARGUMENT**

4 **I. F5 Cannot Recover Fees Incurred for Non-Copyright Claims**

5 F5 mischaracterizes its \$837,602.15 attorneys' fees claim as falling into two groups, which
 6 they label as "Direct Copyright Infringement" and "Related Claims" fees. ECF 173, p. 17. In
 7 reality, F5 is seeking three categories of fees: (1) \$151,416.58 related to Lynwood's one copyright
 8 claim ("Copyright Fees"); (2) \$131,891.10 for the remaining eight non-copyright claims ("Non-
 9 Copyright Fees"); and (3) \$554,294.47 for work that is "unrelated to a specific case theory or claim
 10 for relief" ("Unrelated Fees"). *Id.*; ECF 173-1 at ¶4. F5 cites no authority to support the creation
 11 of a catch-all category to collect fees for work that F5 admits is "untethered to any specific claim for
 12 relief." ECF 173 at p. 17. The only eligible fees under Section 505 are the Copyright Fees, which
 13 F5 claims to be \$151,416.58. The Court should apply the reasonableness analysis to those claimed
 14 fees, and only award F5 the portion of the \$151,416.58 the Court finds reasonable.

15 Fee awards under Section 505 of the Copyright Act are limited to fees attributable to the
 16 prosecution or defense of a copyright claim or related claims. *The Traditional Cat Ass'n, Inc. v.*
Gilbreath, 340 F.3d 829, 833-34 (9th Cir. 2003); *see also Ent. Research Group*, 122 F.3d at 1230-
 17 31 (Section 505 attorneys' fees are limited to "time spent on allowable claims"). The Unrelated Fees
 18 fall outside of Section 505, and the Court should not award them. F5 cannot collect general litigation
 19 fees F5 concedes (ECF 173, p. 17) are "untethered" to Lynwood's copyright claim. *See Stern v.*
Does, 2011 WL 13124449, *5 (C.D. Cal. May 4, 2011) (limiting fee award to categories directly
 20 related to the adjudicated copyright claim); *see also Cupid Wines, Inc. v. Davies*, 2008 WL 11400764
 21 at *2 (C.D. Cal. May 20, 2008) (rejecting request for "fees and costs related to general litigation
 22 efforts on this matter" for failure to "distinguish work on the V-Drink matter from work performed
 23 in defense of Plaintiff's claims"). F5's description that the Unrelated Fees concern a "variety of
 24 work related to general defense tasks" (ECF 173-1, ¶¶32-33) disposes of F5's attempt to recover
 25 unrelated fees that more than treble the Copyright Fees.

1 F5’s total reliance on *Shame on You Productions, Inc. v. Banks*, 893 F.3d 661 (9th Cir. 2018),
 2 is misplaced. ECF 173, p. 17. Reviewing the District Court record from that case demonstrates the
 3 fallacy of F5’s reliance. In *Shame on You*, the parties engaged in extensive discovery motion
 4 practice, including a series of motions to compel, all of which were directly related to the plaintiff’s
 5 copyright claim. *See Shame on You Productions, Inc. v. Banks*, 2016 WL 5929245, *3, 17 (C.D. Cal.
 6 Aug. 15, 2016). F5 complains about the volume of Lynwood’s discovery requests, but F5 never
 7 responded to Lynwood’s discovery requests. ECF 174 at pp. 12-13. Discovery has been stayed
 8 since November 3, 2020, and F5 admits the Unrelated Fees are “untethered” to Lynwood’s copyright
 9 claim. ECF 117; ECF 173 at p. 17.

10 **II. The Non-Copyright Fees Are Not Related To The Copyright Fees**

11 Lynwood’s central causes of action are its breach of contract claims against the Individual
 12 Defendants, which primarily arise under Russian law, and business tort claims against F5 related to
 13 the theft of the “NGINX Enterprise” developed by former Rambler employees for Rambler, and the
 14 Individual Defendants’ later sale of the NGINX Enterprise to F5. ECF 141, ¶¶1-19, 214-218, 277-
 15 280; ECF 178, pp. 20-22. F5 recasts Lynwood’s claims as “first and foremost a copyright
 16 infringement action” (ECF 173 p. 15), but the mere existence of some shared facts between
 17 Lynwood’s copyright claim and the non-copyright claims does not render the claims “related” for
 18 purposes of Section 505 fees. *Ent. Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d
 19 at 1230 (“the mere fact that the Inflatimation [i.e., copyright] claims were part of this overall case
 20 and involved the same parties does not mean that these claims arose from the same “course and
 21 conduct” as the other claims”).

22 In *Ent. Research Group*, the plaintiff asserted twelve causes of action, only two of which
 23 were copyright claims. *Ent. Research Group*, 122 F.3d at 1230. The Ninth Circuit held that the
 24 defendant could only recover its fees defending against the two copyright claims, because the other
 25 claims were based on different legal theories. *Id.* (“The crux of these claims, therefore, was whether
 26 such unauthorized distributions ever took place. The crux of the overall litigation and the other causes
 27 of action, on the other hand—besides the derivative copyright infringement claim—was whether an
 28 agency relationship existed between Genesis and ERG”).

1 As in *Ent. Research Group*, Lynwood's copyright claim presents "distinctly different claims
 2 for relief" from Lynwood's non-copyright claims. Moreover, Lynwood's copyright claim is "based
 3 on different facts and legal theories" from Lynwood's fraud, aiding and abetting, and tortious
 4 interference claims against F5. *Id.*; ECF 178, pp. 20-22.

5 The Eighth (Aiding and Abetting Breach of Duty of Honesty and Loyalty Under Russian
 6 Law), Ninth (Tortious Interference with a Contract), Twelfth (Tortious Interference with a
 7 Prospective Business Advantage), and Thirteenth (Fraud) Claims for Relief against F5 rely on facts
 8 and legal theories that are distinct from Lynwood's copyright claim. The Eighth Claim for Relief
 9 relies on F5's knowledge of the Individual Defendants' employment agreements and obligation
 10 under Russian law in support of its claim that F5 aided and abetted the Individual Defendants' breach
 11 of Russian law. ECF 141, ¶ 639 ("F5's due diligence included a review of the [Individual
 12 Defendants'] past employment and separation agreements with Rambler"); ¶ 641 ("F5 knew about
 13 the [Individual Defendants'] Article 53 duties to act fairly and honestly with Rambler, the [Individual
 14 Defendants'] violations of those duties, and their fraudulent conduct against Rambler"). Likewise,
 15 the Twelfth Claim for Relief relies on F5's knowledge of the Individual Defendants' Employment
 16 Agreements, the Rambler Code of Ethics, and the Rambler Regulations in support of Lynwood's
 17 claim that F5 tortiously interfered with these contracts. ECF 141, ¶¶ 680-90.

18 The timesheets submitted by F5 in response to the Court's Order confirm that the work
 19 performed by F5's lawyers on the copyright claim was unrelated to the work on the non-copyright
 20 claims. Only one of the five partners staffed by F5, Benjamin Fox, spent any material time
 21 addressing the copyright claim. Only one of the four Morrison & Forester associates staffed on the
 22 litigation, Cooper Spinelli, billed any material hours in Copyright Fees. Since this action was
 23 commenced, F5's lead partners, Michael Jacobs and Jessica Grant, billed a total of 5.7 hours and
 24 16.3 hours, respectively, in Copyright Fees.⁴ Mr. Fox billed 69.7 hours in Copyright Fees. Of the
 25

26 ⁴ There are several discrepancies between F5's initial attorneys' fee declaration from Michael
 27 Jacobs (ECF 173) and the Morrison & Forester invoices submitted with F5's supplemental fee
 28 motion. For example, in his declaration Mr. Jacobs contends that in September 2020 he spent 3.4
 hours in Copyright Fees, yet according to the color-coded Morrison & Forester invoice Mr. Jacobs
 only spent 1.5 hours in Copyright Fees in September 2020. ECF 187, Ex. C. For purposes of

1 total 158.7 hours in Copyright Fees billed by Morrison & Forester lawyers, 131.2 hours, or eighty-
 2 three percent (83%), were billed by Mr. Fox and Mr. Spinelli.

3 The time sheets submitted by F5 disprove F5's contention that Lynwood's copyright claim
 4 is interwoven and related to the non-copyright claims. If that contention were true, Mr. Fox would
 5 have been at least somewhat involved in defending the non-copyright claims. ECF 173, pp. 15-16,
 6 18. F5's timesheets reveal that Mr. Fox billed exactly zero minutes related to any of the purportedly
 7 "related" non-copyright claims. *See generally* ECF 187, Exs. A-T. Morrison & Forester's own
 8 staffing demonstrates that F5 appropriately treated Lynwood's copyright claim as separate and
 9 unrelated to Lynwood's non-copyright claims. ECF 178, pp. 20-22. F5's separate treatment of the
 10 copyright and non-copyright claims was appropriate because the copyright claim concerned a unique
 11 set of facts and legal theories.

12 F5's repeated reliance on *Shame on You* for the relatedness argument, is also misplaced. ECF
 13 173, p. 17; ECF 174, pp. 12-13. The plaintiff in *Shame on You* filed a two-count complaint for
 14 copyright infringement and breach of implied contract that "turned on whether or not Defendants
 15 had copied" the disputed work. *Shame on You*, 893 F.3d at 669. In *Shame on You*, the plaintiff
 16 "concede[d] [that] '[t]he vast majority of this case including discovery concerned both of [p]laintiff's
 17 claims equally, in that the copyright infringement and contractual claim arose out of the same set of
 18 facts and circumstances." *Shame on You Productions, Inc. v. Banks*, 2016 WL 5929245 at *13 (C.D.
 19 Cal. Aug. 15, 2016) (emphasis in original). Further, the substantive allegation supporting the
 20 plaintiff's copyright infringement claim were near verbatim identical to the allegation supporting the
 21 breach of implied-in-fact contract claim. *See Shame on You Productions, Inc. v. Banks*, 2:14-cv-
 22 03512-MMM-JC (ECF 135), ¶29 (copyright infringement), ¶46 (breach of implied-in-fact contract).
 23 Based on the plaintiff's admission of relatedness and the identical allegations that supported both
 24 claims in *Shame on You*, the court concluded that "[a]s the claims are interrelated, the Court need
 25 not apportion fees between them." *Shame on You*, 2016 WL 5929245 at *13.

26
 27
 28 addressing F5's fee motion, where there is a discrepancy between Mr. Jacobs' initial declaration
 and Morrison & Forester's invoices, Lynwood relies on Morrison & Forester's invoices.

1 No similar circumstances of relatedness exist in this action. As demonstrated by Morrison &
 2 Forester's time sheets, the siloed treatment of Lynwood's copyright claim combined with the total
 3 lack of any involvement by Mr. Fox in defending against Lynwood's non-copyright claims, confirms
 4 that the non-copyright claims do not "turn on" the copyright claim. There is no basis for the Court
 5 to find that Lynwood's copyright claim is related to the non-copyright claims, and the Court should
 6 reject F5's request for non-copyright fees should be rejected.

7 **III. In the Alternative, the Court Should, At a Minimum, Greatly Reduce the Unrelated**
 8 **Fees**

9 F5 seeks \$403,599.60 in Unrelated Fees incurred during the three-month window of July
 10 2020 through October 2020. During this time, all twenty-six causes of action in the original
 11 complaint were at issue, including eighteen causes of action against F5. The bills produced by F5
 12 show that during this three-month time period F5's lawyers billed for broad categories of tasks such
 13 as "general case strategy" or calls concerning generically described "pending issues" or "issues to
 14 discuss with King & Spalding." *See, e.g.*, ECF 187, Ex. A, pp. 2-3; ECF 173-1, ¶¶32-35. This sum
 15 represents nearly half of the total fees F5 seeks, and seventy-two percent (72%) of the Unrelated
 16 Fees. Necessarily, F5 lawyers' "general" work concerns the sixteen unadjudicated claims (the
 17 "Unadjudicated Claims") that Lynwood deferred by Court Order (ECF 110), and for which F5
 18 stipulated they would not seek fees or costs (ECF 166 p. 2). Despite F5's stipulation, F5 failed to
 19 exclude any of the \$403,599.60 in Unrelated Fees for "general defense work" (*see, e.g.*, ECF 173-1,
 20 ¶32), which necessarily related to the Unadjudicated Claims.

21 F5 claims, without explanation, that the Unrelated Fees all arise from general case work and
 22 then F5 tries to recover all of the Unrelated Fees. ECF 173, pp. 16-17. However, the general
 23 casework obviously was done for all of the claims, including the sixteen unadjudicated claims and
 24 the eight non-copyright claims the Court adjudicated. Therefore, under Supreme Court and Ninth
 25 Circuit precedent, it is incumbent on F5 to segregate its fees and only recover the fees incurred
 26 defending against the copyright claim. *See Ent. Research Group*, 122 F.3d at 1230 ("Accordingly,
 27 under the rule requiring segregation of attorney's fees, the district court should not have awarded
 28

1 [the defendant] any attorney's fees incurred in doing work on these other claims") (citing *Hensley v.*
 2 *Eckerhart*, 461 U.S. 424, 434-35 (1983).

3 F5's partial reduction of fees billed by Morrison & Forester's trademark team and time spent
 4 by one partner (Eric Tate) on the Unadjudicated Claims, does not address time spent by the dozen
 5 other Morrison & Forester timekeepers who billed time between July to October 2020. ECF 173, p.
 6 22. The generic descriptions provided in Morrison & Forester's time records render it impossible
 7 for Lynwood or the Court to verify what portion of the Unrelated Fees from July 2020 through
 8 October 2020 are tied to Lynwood's copyright claim, the non-copyright claims, or the Unadjudicated
 9 Claims. Therefore, the Court should not award any of the Unrelated Fees.

10 In the alternative, if the Court decides that any portion of the Unrelated Fees is recoverable,
 11 then the Court should, at a minimum, reduce F5's claim for "general defense work." F5's failure to
 12 reduce its claim for fees working on the Unadjudicated Claims requires the Court to proportionally
 13 reduce its award of fees to account for the unrecoverable Unadjudicated Claims and non-copyright
 14 claims. *See Traditional Cat Ass'n*, 340 F.3d at 834 ("The fact that it is not a simple task to discern
 15 from this data precisely what fees are attributable to the copyright claim does not excuse a failure to
 16 make such an allocation"). Without waiving Lynwood's argument that no Unrelated Fees should be
 17 award, and notwithstanding F5's burden to properly segregate the fees, Lynwood proposes some
 18 methods for reducing the fees claimed by F5.

19 First, from July 2020 through October 2020, any general casework would have been in
 20 furtherance of all twenty-six causes of action (eighteen against F5) in the original complaint. As
 21 Defendants can only seek fees for the lone adjudicated copyright claim, a proportional reduction is
 22 appropriate. Only one of the eighteen claims against F5 in the original Complaint was the
 23 adjudicated copyright claim, and all eighteen were in play during the July 2020 through October
 24 2020 time period. Therefore, at most, the Court should award F5 one-eighteenth (5.5%) of the
 25 Unrelated Fees for "general defense work" during the July 2020 through October 2020 time period.
 26 That totals \$22,197.97. The reduction under this alternative is to reduce the July 2020 through
 27 October 2020 Unrelated Fees by \$381,401.63.

1 As a second alternative, the Court could reduce the Unrelated Fees based on F5’s stipulation
 2 that it would not seek any fees for the Unadjudicated Claims. Again, from July 2020 through October
 3 22, 2020, there were twenty-six active causes of action in the original complaint (eighteen against
 4 F5). From and after October 22, 2020, only five claims against F5 were litigated and adjudicated.
 5 Given F5’s stipulation that it would not seek fees for the Unadjudicated Claims, it would, at a
 6 minimum, be appropriate for the Court to reduce the fee claim for general case work performed
 7 during July through October 2020 in proportion of the total number of claims against F5 at that time
 8 (eighteen) versus the five adjudicated claims that were against F5. Only 27.8% of the claims against
 9 F5 were adjudicated, and F5 agreed not to seek fees for the Unadjudicated Claims. F5 should receive
 10 no more than 27.8% of its fees performing general casework while it was litigating all the claims
 11 against F5. Accordingly, at a minimum the Court should reduce the Unrelated Fees from July 2020
 12 through October 2020 to \$112,200.69 (27.8% of \$403,599.60). Therefore, the reduction under this
 13 alternative is \$281,398.91.

14 A proportional decrease is, at a minimum, required and consistent with F5’s own proportional
 15 allocation of fees related to F5’s motion to dismiss Lynwood’s initial complaint which addressed the
 16 Unadjudicated Claims. ECF 173-1, ¶31; *see also Batchelder v. Geary*, 2007 WL 2427989 at *10
 17 (N.D. Cal. Aug. 22, 2007) (fee request limited to 1/6 of the “fees for services rendered that cannot
 18 be allocated to a specific issue”).

19 **IV. F5’s Counsel’s Excessive Billing Rates Preclude A Reasonableness Finding**

20 The excessive billing rates charged by the Morrison and Forester partner timekeepers
 21 precludes a finding of reasonableness. *See* ECF 173-1, ¶ 25. The reasonableness of an attorney’s
 22 rate is measured by the “prevailing market rates in the relevant community.” *Blum v. Stenson*, 465
 23 U.S. 886, 895 n.11 (1984). “The burden is on the fee applicant to produce satisfactory evidence—
 24 in addition to the attorney’s own affidavits—that the requested rates are in line with those prevailing
 25 in the community.” *Id.* “Generally, when determining a reasonable hourly rate, the relevant
 26 community is the forum in which the district court sits.” *Camacho v. Bridgeport Financial, Inc.*,
 27 523 F.3d 973, 979 (9th Cir. 2008).

1 Contrary to F5’s contention, the actual rate charged by Morrison & Forester is irrelevant to
 2 the Court’s determination of a “reasonable hourly rate.” *Welch v. Metropolitan Life Ins. Co.*, 480
 3 F.3d 942, 946 (9th Cir. 2007) (“We have repeatedly held that the determination of a reasonable
 4 hourly rate ‘is not made by reference to the rates actually charged [by] the prevailing party.’”); ECF
 5 173 at pp. 17-18.⁵ Rather, billing rates “should be established by reference to the fees that private
 6 attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying
 7 clients for legal work of similar complexity.” *Welch*, 480 F.3d at 946.

8 The billing rate for the Morrison and Forester partner timekeepers, Michael Jacobs, Jessica
 9 Grant and Benjamin Fox (together the “F5 Partners”) far exceeds the prevailing rates for like-skilled
 10 professionals in the relevant legal markets. F5 acknowledges that the according to the American
 11 Intellectual Property Law Association (“AIPLA”) the mean billing rate for partners in the San
 12 Francisco area, where Michael Jacobs and Jessica Grant are based, “was \$665 in 2020, and the third
 13 quartile (75%) was \$903.” *See* ECF 173-1 at Par. 26. For the Los Angeles area, where Morrison
 14 and Forester’s lone copyright partner on the case Benjamin Fox practices, the mean 2020 billing rate
 15 for partners was \$657 and the top third quartile was \$780. The 2020 rates for the F5 Partners are
 16 \$980 (Benjamin Fox), \$1,000 (Jessica Grant) and \$1,200 (Michael Jacobs). F5 offers no explanation
 17 for why or how rates that are between 50% to 80% higher than the acknowledged mean billing rates
 18 and 10% to 20% higher than the third quartile rate “are in line with those prevailing in the community
 19 for similar services by lawyers of reasonably comparable skill, experience and reputation.” *Blum*,
 20 465 U.S. at 895 n.11; *Sream, Inc. v. Sahebzada*, 2019 WL 2180224 at *11 (N.D. Cal. Mar. 6, 2019)
 21 (relying on the AIPLA and finding that hourly rates of \$400 for partners and \$275 for associates
 22 were reasonable). F5 offers no evidence to justify of counsel Paul Goldstein’s hourly rate of \$840
 23 and fees for Mr. Goldstein’s work should be denied. If allowed, Mr. Goldstein’s rate should be
 24 reduced to \$598.50, a discounted rate of 90% of the median billing rate for partners at private firms
 25 in the San Francisco area.

26 ⁵ F5 relies on the District of Nevada’s decision in *Oracle USA, Inc. v. Rimini St., Inc.*, 209 F.Supp.3d
 27 1200 (D. Nev. 2016), to argue that counsel’s “actual rates” are appropriate, but this reliance is
 28 misplaced. ECF 173 at pp. 17-18. *Oracle* runs counter to binding Ninth Circuit precedent, and the
 Court should not rely on it in this case.

1 F5 does not cite a single case where any court has found that hourly rates of \$980-\$1,200
 2 were found to be reasonable. *See Big Baboon, Inc. v. SAP America, Inc.*, 2019 WL 5088784 at *8
 3 (N.D. Cal. Sept. 9, 2019) (relying on the 2017 AIPLA and finding reasonable “hourly rates of up to
 4 \$450 for Partners; \$375 for Of Counsel; up to \$300 for Staff Attorneys; and \$260 for Associates”).⁶
 5 The fact that the F5 Partners happen to be associated with a “large and prestigious firm[]...has no
 6 legal significance” and does not justify the excessive premium fees F5 seeks. *Yahoo!, Inc. v. Net*
 7 *Games, Inc.*, 329 F.Supp.2d 1179, 1192 (N.D. Cal. 2004) (finding that \$190/hour was the reasonable
 8 “average market rate” for attorneys’ fees in a trademark infringement case). F5’s strategic decision
 9 to retain counsel that charged above-market rates is irrelevant to the reasonableness determination
 10 because “what an attorney is free to collect under a fee agreement [is] not necessarily measured by
 11 the ‘reasonable attorney’s fee’ that a defendant must pay pursuant to court order.” *See Venegas v.*
 12 *Mitchell*, 495 U.S. 82, 90 (1990) (a reasonable attorney fee award “controls what the losing [party]
 13 must pay, not what the prevailing party must pay his lawyer”).

14 In *Shame on You*, the Court found that an hourly rate for \$595 was a “reasonable rate” for
 15 counsel that “has been practicing law for almost thirty years,” “has more than twenty years of
 16 experience litigating copyright actions,” and “has served as lead counsel in nearly twenty cases that
 17 have been tried to verdict.” *Shame on You*, 2016 WL 5929245 at *14. The credentials offered by
 18 counsel in *Shame on You*, equal or exceed the credentials for the F5 Partners. *See* ECF 173-1 at Pars.
 19 13-17. F5 offers no exceptional reason for why the F5 Partner hourly rates that on average nearly
 20 double the hourly rate found reasonable in *Shame on You* and exceed the AIPLA survey, are
 21 reasonable or consistent with prevailing hourly rates. *See Yahoo!*, 329 F.Supp.2d at 1186.

22 The evident excessive hourly rates charged by the F5 Partners precludes a finding of
 23 reasonableness. If any fee award is issued, Lynwood requests that the Court reduce the hourly fees
 24 for the F5 Partners to \$657 for Benjamin Fox and \$665 for Michael Jacobs and Jessica Grant, which

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 26
 27 ⁶ “The 2017 AIPLA indicates that the mean billing rate for partners at private firms in the San
 28 Francisco area was \$634 in 2016, and the median rate was \$525,” and that the “mean billing rate for
 associates was \$476 in 2016 and the median was \$488.” *Big Baboon*, 2019 WL 5088784, at *8.

1 reduction is supported by the evidence submitted by F5 as the prevailing hourly rate in the San
 2 Francisco and Los Angeles areas. *See* ECF 173-1 at Par. 26; *see also* *Welch*, 480 F.3d at 946.

3 **V. F5 Should Not Recover For Excessive Billing**

4 F5's entitlement to attorneys' fees is limited to "[r]easonable hours...that 'would have been
 5 undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit
 6 of a successful recover." *Armstrong v. Davis*, 318 F.3d 965, 971 (9th Cir. 2003). F5 seeks an
 7 astounding 996 hours in fees from July 2020-April 2022, exclusive of the unallocated 964.7 hours
 8 billed on F5's motion to dismiss Lynwood's initial complaint, which F5 contends was billed at a flat
 9 rate. *See* ECF 137-1 at ¶¶31-52; ECF 187, Ex. A, pp. 14-15, Ex. B, pp. 21-22, Ex. F, pp. 11-12. In
 10 total, F5 claims to have billed 1,960.7 hours at the pleading stage, before F5 responded to Lynwood's
 11 discovery requests, and without a single hearing on any application or motion filed by the parties.
 12 The bulk of the hours were billed in two separate three-month periods from July to September 2020
 13 and May to July 2021 when F5 moved to dismiss Lynwood's complaint and amended complaint,
 14 respectively. Otherwise, the case remained largely dormant between August 2021 and May 2022.
 15 In the cases F5 cites, which similarly involved pre-discovery motions to dismiss an initial complaint
 16 and amended complaint, courts have awarded fees for far fewer hours. For example, in *Washington*
 17 *v. ViacomCBS, Inc.*, 2021 WL 6134375 (C.D. Cal. Dec. 9, 2021) the court concluded that 398 hours
 18 was reasonable to respond to plaintiff's initial and amended complaint and to engage in settlement
 19 negotiations. *Id.* at *6. Here, there is no justification for the massive hours charged by F5's lawyers
 20 for mere motion practice.

21 **CONCLUSION**

22 The Court should only consider the Copyright Fees for the award. The other claims are not
 23 related to the lone copyright claim adjudicated by the Court. F5 asserts the Copyright Fees total
 24 \$151,416.58. The Court should reduce the total remaining Copyright Fees by forty-five percent
 25 (45%) to account for excessive hourly rates and unnecessary duplication of effort.

26 The Court should reject F5's claim for Non-Copyright Fees (\$131,891.10), because they are
 27 unrelated to the lone copyright claim as confirmed in the timesheets submitted by F5 which
 28 demonstrate its sophisticated law firm bifurcated the staffing between the lone copyright claim and

1 the nine non-copyright adjudicated claims. In the alternative, if the Court decides to award any of
 2 the alleged Non-Copyright Fees by concluding they are related to the copyright claim, then the Court
 3 should greatly reduce the amount sought. The Court should reduce the total remaining Non-
 4 Copyright Fees by forty-five percent (45%) to account for excessive hourly rates and unnecessary
 5 duplication of effort.

6 The Court should disallow F5's claim for \$554,294.47 in Unrelated Fees that F5 concedes
 7 are "untethered" to any particular claim. In the alternative, the Court should, at a minimum, greatly
 8 reduce the Unrelated Fees it awards. F5's records show that F5 is seeking \$403,599.60 in Unrelated
 9 Fees incurred from July 2020 through October 2020. To account for the fact that the Unrelated Fees
 10 include fees for general work while there were eighteen claims active against F5 and only one of the
 11 claims was the adjudicated copyright claim, the Unrelated Fees must be reduced by \$381,401.63. In
 12 the alternative, to account for the fees incurred addressing the thirteen Unadjudicated Claims for
 13 which F5 stipulated they would not seek fees, the Unrelated Fees must be reduced by \$281,398.91.
 14 Therefore, if the Court determines that Unrelated Fees are eligible for the award, the Court should
 15 reduce them by either \$281,398.91 or \$381,401.63. The Court should then reduce the total remaining
 16 Unrelated Fees by forty-five percent (45%) to account for excessive hourly rates and unnecessary
 17 duplication of effort.

18 DATED: February 7, 2023

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